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AUDIO SERVICES

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In re Applications of

DARRELL BRYAN

SBH PROPERTIES, INC.

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MM Docket No. 93-241

File No. BPH-920109MA

File No. BPH-920123MD

For Construction Permit for  
New FM Channel 276A  
Tusculum, Tennessee

To: Honorable John M. Frysiak  
Administrative Law Judge

OPPOSITION TO PETITION FOR LEAVE TO AMEND

SBH Properties, Inc. ("SBH") by counsel, pursuant to Section 1.294 of the Commission's Rules, herewith submits its opposition to the Petition for Leave to Amend, filed by Darrell Bryan ("Bryan") on September 16, 1993. In support whereof the following is shown:

1. Bryan seeks leave to amend Section V-B, Item 17 of his Application to revise the figures previously reported with respect to the area and the population that would be served by his proposed 1.0 mV/m contour. In his Application Bryan reported these figures as 2,122 square kilometers and 95,440 persons. After having noted the Mass Media Bureau's conclusion that "there would be a significant difference in the size of the areas and populations which would receive service from the proposals" (HDO at para. 5), Bryan and his engineer have suddenly decided that

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the previously submitted figures are incorrect and Bryan seeks leave to amend to "correct" these figures to reflect much higher values in order to eliminate any such "significant difference."

2. SBH opposes Bryan's Amendment. Although couched in terms of disclaiming any attempted comparative upgrading, acceptance of Bryan's Amendment for any purpose other than reporting (pursuant to Section 1.65) most certainly would constitute comparative upgrading. Accordingly, Bryan's Amendment may not be accepted pursuant to Section 73.3522. Likewise, Bryan has not demonstrated compliance with any other element of the good cause standard, applicable to amendments filed pursuant to 73.3522(b)(1), much less the more stringent lack of foreseeability test applicable to engineering amendments, such as this. 1/

3. While Bryan contends that his Amendment merely serves to correct an error in his Application, he has failed to explain how such an error occurred nor has he given any indication as to the methodology utilized in deriving the corrected figures. Accordingly, there exists no basis for believing that his engineer's more recent calculations are any more "correct" than

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1. Bryan's contention that he has acted with diligence, since reviewing the HDO, because he "had expected no significant differences in areas and population" is ludicrous in light of the fact that the applications at issue in this proceeding (which reflect significantly different areas and populations) had been on file over 20 months at the time the HDO was released. Thus, Bryan has evidenced the very antithesis of diligence.

those reflected in the Application nor has Bryan provided any area or population figures for SBH's proposal from which a comparison could be made.

4. In fact, as reflected in the attached Declaration of Dwight R. Magnuson, P.E., the figures advanced by Bryan in his Amendment are not correct. As reflected in the attached Declaration, Bryan's proposal, as set forth in his Application, would provide primary service to an area of 2,200 square kilometers and 103,304 persons. By contrast SBH's proposal would provide primary service to an area of 2,543 square kilometers and 138,888 persons, reflecting a 34.5% population advantage on the part of SBH. Accordingly, the Mass Media Bureau's conclusion that "there would be a significant difference in the size of the areas and populations which would receive service from the proposals" is entirely correct and appropriate engineering testimony should be admitted into the record and considered.

5. SBH has the right to have its coverage advantage given full and fair consideration under the standard comparative issue, pursuant to paragraph 5 of the HDO. Indeed, the Court of Appeals has in a number of recent cases expressed its growing dissatisfaction with the Commission's policy of awarding comparative credit for integration of ownership into management. Flagstaff Broadcasting Foundation v. FCC, 979 F.2d 1566 (D.C. Cir. 1992); Bechtel v. FCC, 957 F. 2d 873 (D.C. Cir. 1992) Therefore, this case may well be decided on the basis of comparative coverage. Bryan's attempt to eliminate any

consideration of comparative coverage in this proceeding through the filing of a concocted "corrective" amendment should not be countenanced. 2/

6. Therefore, Bryan's Amendment may not be accepted pursuant to Section 73.3522(b) nor may it be accepted for any purpose other than reporting. While Bryan's Amendment arguably is acceptable pursuant to Section 1.65, its acceptance pursuant to that Section would have no impact, whatsoever, with regard to the comparative aspects of this proceeding, including comparative coverage. Accordingly, SBH opposes acceptance of Bryan's Amendment for any purpose other than reporting purposes, pursuant to Section 1.65.

WHEREFORE, premises considered, Bryan's Petition for Leave to Amend should be ACCEPTED for Section 1.65 reporting purposes, only, and DENIED in all other respects.

Respectfully Submitted

SBH PROPERTIES, INC.

By: 

Timothy K. Brady  
Its Attorney

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Brentwood, TN 37027-0986  
(615) 371-9367

September 27, 1993

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2. That this is Bryan's motivation is evident from his contention (at p. 2) that "If the amendment is not accepted, the parties will have to arrange for the preparation of a joint engineering exhibit, which will involve additional expenses for the parties, and require Bureau analysis."

**DECLARATION AND QUALIFICATIONS OF CONSULTANT**

State of Tennessee     )  
City of Knoxville       )           ss:  
County of Knox           )

DWIGHT R. MAGNUSON deposes and says that he is registered professional engineer in the State of Tennessee by examination, no. 11,733. He holds the degrees of Bachelor of Science in Mechanical Engineering from the University of Tennessee and Master of Engineering in Nuclear Engineering from the University of Virginia. His qualifications are a matter of record before the Federal Communications Commission; he has been active in broadcast engineering since 1983.

He has been engaged by SBH Properties, Inc. to prepare the attached technical exhibit. SBH is an applicant for channel 276A allocated to Tusculum, TN (BPH-920123MD). The following analysis was prepared by him and all material and exhibits attached hereto are believed to be true and correct.

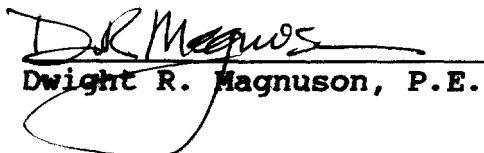
I examined the application of Darrell Bryan (an applicant for channel 276A, Tusculum, TN, BPH-920109MA) to verify the population covered by the 60 dBu contour. FCC file information regarding antenna height, location and ERP were used to calculate the distance to the 60 dBu contour for every 10 degrees of azimuth. All contour calculations use the NGDC 30-second terrain elevation data file and EDX Engineering, Eugene, OR software.

The resulting coverage contour served as the input for a 1990 population count run by software developed by Richard Biby, Communications Data Services, Falls Church, VA.

The same methodology described above was used to calculate the population under SBH's 60 dBu contour. This data is presented on page 17 of FCC form 301 of the SBH original application.

I determined that Bryan's proposal covers 2200 square kilometers and would serve 103,304 people. SBH's proposal covers 2543 sq. km and would serve 138,888 people. SBH's application covers 343 sq. km more than Bryan's (15.6%) and 35,584 more people (34.5%).

I certify under penalty of perjury that the above statement is true. Signed and dated this 23<sup>rd</sup> day of September 1993.

  
Dwight R. Magnuson, P.E.

CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that on or before the  
29th day of September, 1993, I will have served a copy of the  
foregoing Opposition to Petition for Leave to Amend by First  
Class mail, postage prepaid upon the following:

Honorable John M. Frysiak  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, NW, Room 223  
Washington, DC 20554

Robert A. Zuaner, Esq.  
Hearing Branch  
Federal Communications Commission  
2025 M Street, NW, Room 7212  
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(Counsel for Darrell Bryan)

  
TIMOTHY K. BRADY